

**Applicant's Supplemental Response**

Applicant would like to supplement Applicant's 12/20/07 arguments to the Examiner.

Applicant would like to respectfully present to the Examiner in further support of Applicant's Argument of Copying by Others MPEP 716.06:

Another form of secondary evidence which may be presented by applicants during prosecution of an application, but which is more often presented during litigation, is evidence that competitors in the marketplace are copying the invention instead of using the prior art. However, more than the mere fact of copying is necessary to make that action significant because copying may be attributable to other factors such as a lack of concern for patent property or contempt for the patentees ability to enforce the patent. *Cable Electric Products, Inc. v. Genmark, Inc.*, 770 F.2d 1015, 226 USPQ 881 (Fed. Cir. 1985). Evidence of copying was persuasive of nonobviousness when an alleged infringer tried for a substantial length of time to design a product or process similar to the claimed invention, but failed and then copied the claimed invention instead. *Dow Chem. Co. v. American Cyanamid Co.*, 837 F.2d 469, 2 USPQ2d 1350 (Fed. Cir. 1987). Alleged copying is not persuasive of nonobviousness when the copy is not identical to the claimed product, and the other manufacturer had not expended great effort to develop its own solution. *Pentec, Inc. v. Graphic Controls Corp.*, 776 F.2d 309, 227 USPQ 766 (Fed. Cir. 1985). See also *Vandenberg v. Dairy Equipment Co.*, 740 F.2d 1560, 1568, 224 USPQ 195, 199 (Fed. Cir. 1984) (evidence of copying not found persuasive of nonobviousness) and *Panduit Corp. v. Dennison Manufacturing Co.*, 774 F.2d 1082, 1098-99, 227 USPQ 337, 348, 349 (Fed. Cir. 1985), *vacated on other grounds*, 475 U.S. 809, 229 USPQ 478 (1986), *on remand*, 810 F.2d 1561, 1 USPQ2d 1593 (Fed. Cir. 1987) (evidence of copying found persuasive of nonobviousness where admitted infringer failed to satisfactorily produce a solution after 10 years of effort and expense).

Applicant would also like to submit to the Examiner the importance of Dental, as Dentel is a much closer reference to the instant invention and the instant claims. While Dentel taught away from the use of an iron salt (such would by equivalency apply to aluminum salt) in combination with a cationic polyacrylamide, Dental is closer to the instant invention and the instant claims; as, Dental's teachings were in relation to an iron salt with a cationic polyacrylamide. Lo Sasso taught use of an iron salt with a non-ionic polycarylamde, while the instant invention claims do not claim a non-ionic polyacrylamide. The instant claims do claim the use of an iron salt with a cationic polycarylamide. Applicant refers the Examiner to MPEP 716.02(e):

Applicants may compare the claimed invention with prior art that is more closely related to the invention than the prior art relied upon by the examiner. *In re Holladay*, 584 F.2d 384, 199 USPQ 516 (CCPA 1978); *Ex parte Humber*, 217 USPQ 265 (Bd. App. 1961) (Claims to a 13-chloro substituted compound were rejected as obvious over nonchlorinated analogs of the claimed compound. Evidence showing unexpected results for the claimed compound as compared with the 9-, 12-, and 14- chloro derivatives of the

compound rebutted the *prima facie* case of obviousness because the compounds compared against were closer to the claimed invention than the prior art relied upon.).

Applicant would also like to present to the Examiner MPEP references in relation to hindsight reconstruction, wherein these references support Applicant's argument in citing *KSR International v. Teleflex, Inc. et al.*, No. 04-1350, 550 U.S. \_\_ (2007). Specifically, Applicant refers the Examiner to MPEP 2141.01 III:

**CONTENT OF THE PRIOR ART IS DETERMINED AT THE TIME THE INVENTION WAS MADE TO AVOID HINDSIGHT**

The requirement "at the time the invention was made" is to avoid impermissible hindsight. See **MPEP § 2145**, paragraph X.A. for a discussion of rebutting applicants' arguments that a rejection is based on hindsight.

"It is difficult but necessary that the decisionmaker forget what he or she has been taught . . . about the claimed invention and cast the mind back to the time the invention was made (often as here many years), to occupy the mind of one skilled in the art who is presented only with the references, and who is normally guided by the then-accepted wisdom in the art." *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303, 313 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984).

Applicant also refers the Examiner to MPEP 2145.X.A:

**X. ARGUING IMPROPER RATIONALES FOR COMBINING REFERENCES**

**A. Impermissible Hindsight**

Applicants may argue that the examiner's conclusion of obviousness is based on improper hindsight reasoning. However, "[a]ny judgement on obviousness is in a sense necessarily a reconstruction based on hindsight reasoning, but so long as it takes into account only knowledge which was within the level of ordinary skill in the art at the time the claimed invention was made and does not include knowledge gleaned only from applicant's disclosure, such a reconstruction is proper." *In re McLaughlin* 443 F.2d 1392, 1395, 170 USPQ 209, 212 (CCPA 1971). Applicants may also argue that the combination of two or more references is "hindsight" because "express" motivation to combine the references is lacking. However, there is no requirement that an "express, written motivation to combine must appear in prior art references before a finding of obviousness." See *Ruiz v. A.B. Chance Co.*, 357 F.3d 1270, 1276, 69 USPQ2d 1686, 1690 (Fed. Cir. 2004). For example, motivation to combine prior art references may exist in the nature of the problem to be solved (*Ruiz* at 1276, 69 USPQ2d at 1690) or the knowledge of one of ordinary skill in the art (*National Steel Car v. Canadian Pacific Railway Ltd.*, 357 F.3d 1319, 1338, 69 USPQ2d 1641, 1656 (Fed. Cir. 2004)). See **MPEP § 2143.01** for a discussion of proper motivation to combine references.

**CONCLUSION**

Applicant respectfully requests entry of this supplemental response, along with favorable reconsideration of the pending claims presented in the response and amendment dated 12/20/07.

To facilitate the resolution of any issues or questions presented by this paper, Applicant respectfully requests that the Examiner directly contact the undersigned by phone to further the discussion, reconsideration and allowance of the claims.

**Respectfully submitted,**

A handwritten signature in black ink, appearing to be 'R. Haase', written over a horizontal line.

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